Supreme Court, U.S.
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No. 91-2067

IN THE
Supreme Court Of The United States
October Term, 1991

NORA D. BRAYSHAW, M.D.,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPERIOR COURT APPELLATE DIVISION

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INTRODUCTION

Nora D. Brayshaw respectfully submits this reply brief in further support of her Petition for a Writ of Certiorari to the New Jersey Superior Court Appellate Division ("Pet."). In her petition Brayshaw presented three questions concerning the meaning of procedural due process for the Court's review:

> (1) whether the State of New Jersey ("State") violated the Due Process Clause by protracting Brayshaw's post-suspension proceeding over a two and one-half year period lasting from September 9, 1987 to February 14, 1990;
>
> (2) whether the State violated the Due Process Clause by improperly shifting the burden of proof to Brayshaw to establish that the State's delay was unjustified; and
>
> (3) whether the State violated the Due Process Clause by denying Brayshaw access to other-physician records necessary for the cross-examination of the State's witnesses.

The State attempts no legally acceptable response to any of the questions raised by petitioner Brayshaw. As to petitioner's claim of unconstitutional delay (POINT I below), the State simply makes *no* effort to justify the facts that: (1) two and one-half years elapsed from her suspension on September 9, 1987 to final decision on February 14, 1990; and (2) only 56 hearing days were used of the 311 available between the commencement of the hearing on November 30, 1987 and its conclusion on April 18, 1989. Rather, it responds by attempting to blame Brayshaw for certain very minor parts of the delay by what is shown below to constitute deliberate distortion of the record.

In response to petitioner Brayshaw's claim that the State has improperly shifted the burden of proof to her to prove that the State's delay was unjustified (POINT II below), the State has squarely placed that issue before the Court by taking the harsh and untenable position that the burden should be placed on petitioner because Brayshaw's reputation was thoroughly destroyed by the initial order of suspension. (Brief in Opposition to Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division on Behalf of Respondent State of New

Jersey, State Board of Medical Examiners ("Resp. Br.") at 18) In grounding its defense on that obviously unacceptable premise, apparently accepted by the New Jersey Superior Court, Appellate Division, the State totally ignores this Court's precedents which emphasize the paramount nature of the petitioner's interest in a prompt hearing following the temporary suspension of a license. *Federal Deposit Insurance Corp. v. Mallen*, 486 U.S. 230 (1988); *Barry v. Barchi*, 443 U.S. 55 (1979); *Fusari v. Steinberg*, 419 U.S. 379 (1975).

In response to petitioner Brayshaw's claim that she was denied other-physician records of the patients at issue (POINT III below), the State contents itself with reliance on the "confidentiality" of the patient-physician privilege (Resp. Br. at i, 18) with its utterly unexplained and clearly erroneous *ipse dixit* of "non-pertinence" (*id.* at 20) and with a highly deceptive general assurance to this Court that Brayshaw actually received other-physician records, when the record, as demonstrated below, shows that this is true with respect to only three of the twenty-seven patients who were at issue. (*Id.*)

What is most disturbing about the State's opposition is its attempt, before this Court, to pursue further its campaign of character assassination by publication of false and unproven charges of misconduct. As is briefly shown below (POINT IV), this case involves nothing more than the ALJ's conclusions that petitioner Brayshaw should have obtained physical examinations of her clients before administering Synthroid, rather than relying on the findings as reported by her patients, as is common practice in her field of psychiatry, and her failure to return certain telephone calls personally. It does not involve any proven charges of the misprescription of drugs; of any physical consequences of such misprescription; of the spurious or financially improper use of DNB labs; or of strategies of attrition. (Resp. Br. at 6, 11) In its attempt to cover up its indefensible denial of due process to petitioner Brayshaw, the State seeks to "poison the well" of judicial review by tactics which might be merely unprofessional if practiced by private counsel but are clearly reprehensible in the hands of a public authority.

I. THE STATE FAILS TO PROVIDE ANY JUSTIFICATION FOR THE UNDULY PROTRACTED TWO AND ONE-HALF YEAR PERIOD OF PETITIONER BRAYSHAW'S POST- SUSPENSION HEARING.

In her petition, petitioner Brayshaw demonstrated that two and one-half years elapsed between her suspension on September 9, 1987, and the Board's Final Decision of February 14, 1990. (Pet. at 12)[1] She further demonstrated that the State used only 56 of 311 hearing days available from commencement of the hearings on November 30, 1987 to their completion on April 18, 1989. (Pet. at 13) The State does not dispute that no other court has ever upheld a post-suspension hearing as protracted as this one. (Pet. at 13) Nor does the State undertake the burden of justifying this protracted delay in any coherent, systematic fashion.

Rather, the State first mischaracterizes the question presented to this Court; Brayshaw does not contend that she is entitled to a "pre-determined date for a definite conclusion of a disciplinary proceeding". (Resp. Br. at 17) But procedural due process does require a state to insure a prompt hearing following the suspension of a license, which deprives its holder of the ability to earn a livelihood. While a state's failure to regulate the timing of such hearings may support a finding of a due process violation, *e.g., Gershenfeld v. Justices of the Supreme Court of Pa.*, 641 F. Supp. 1419, 1424-25 (E.D. Pa. 1986), the existence of such regulations does not by itself establish compliance with the demands of due process. *Barry v. Barchi*, 443 U.S. 55, 60-61 (1979). Even more clearly, the interstitial time limitations relied on by the State (Resp. Br. at 17-18) (which were extended and then violated in this case (Pet. at 8-9)) provide no defense for the undue protraction of the post-suspension process as a whole. In any event, affording due process must reflect a proper balancing of the interests of the individual against those of the state.

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[1] For the convenience of the Court, Brayshaw has used the same abbreviations as the State. (*See* Resp. Br. at 2) PaE refers to exhibits which Brayshaw has filed with the Clerk of the Court, and RaE refers to exhibits which the State has filed with the Clerk of the Court. Pa refers to Brayshaw's appendix.

However, as the Court explained in *Barchi*, after a temporary suspension, the licensee's "interest in a speedy resolution becomes *paramount*". *Id.* at 66 (emphasis added).

Apart from mischaracterizing the due process issue raised by the protracted proceedings below, the State seeks to defend them by launching a series of very narrow and highly disingenuous attacks on petitioner Brayshaw's alleged role in the proceedings. Perhaps the most outrageous (and revealing) of these attempts is the State's attempt to litigate by repetition of the sound-bite "strategy of attrition". (Resp. Br. at i, 6, 7, 16)

The State repeatedly quotes out of context the words "strategy of attrition" from a letter to counsel which was not a part of the record below and which was admitted into evidence in a separate, sealed proceeding to determine whether to permit Brayshaw's counsel to withdraw. (Resp. Br. at 6, 16) The purpose of the letter was to persuade counsel to continue to represent Brayshaw. In the letter Brayshaw explains that she has already paid legal fees approximating counsel's estimate for the entire case, and, referring to his "strategy of attrition", *complains* that counsel's appeals and objections have been expensive and ineffective. (Ra E10a) Having moved to expedite the case, even at the expense of foregoing discovery, and having proposed to limit the case to six patients, Brayshaw at all times sought a prompt resolution of the post-suspension hearing and never intended to prolong the proceedings. (*See* Pet. at 6) Given the context of the phrase, it is simply deceptive for the State to claim that petitioner Brayshaw "approved" (Resp. Br. at n.7) or "chose" (*id.* at 16) any such strategy.

Apart from playing misleading word games, the State claims that petitioner cancelled 16 of the 28 initially scheduled hearing dates which were to be held between November 30, 1987 and January 22, 1988. That claim is false. In fact, 17 of the 28 hearing days were utilized during that period. Of the remaining 11 days, the State admits that three were canceled by the State and only five are listed as adjourned at the request of petitioner on the records referred to by the State. (PaE 397a-400a)

The State contends that Brayshaw further contributed to the delay by cross-examining the State's only two expert witnesses for twice as many days as the State took to examine these witnesses on direct (Resp. Br. at 6) and by not appearing for the cross-examination of other witnesses after the withdrawal of Brayshaw's attorney. (*Id.* at 7) But a ratio of 2:1 cross-examination to direct examination is typical trial practice, and Brayshaw's failure to cross-examine most witnesses could only have expedited the proceedings.[2] The State is likewise wrong in attributing delay to Brayshaw's request that the State call only two witnesses per day. (Resp. Br. at 7) Neither the ALJ nor the State ever complied with this request. In fact, out of the ten hearing days following that request of January 10, 1989, the State called four witnesses on one day, three witnesses on two days and one witness on five days, thus exposing the State's reliance on petitioner's request of January 10 as pure chicanery. (PaE 405a-406a)

Viewed as a whole, the State's attempts to justify its protracted two and one-half year proceeding deal with only a small fraction of the 311 potential hearing days at issue and do not even attempt to justify the additional ten months which elapsed between the close of hearings on April 18, 1989 and final decision on February 14, 1990. Worse yet, each of the State's attempts is, upon analysis, a plain distortion of the record below. Given the showing made before this Court, petitioner respectfully submits that the State has proffered no reasonable justification for

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[2] The State repeatedly and misleadingly complains of the "extraordinary burdens she [Brayshaw] had placed on the ALJ and the Board by her departure from the State" and seeks to indict Brayshaw for the crime of failing to provide her home address. (Resp. Br. at 16, 21) But the State never identifies the burdens which Brayshaw's move entailed. When Brayshaw initially moved to California, she was represented by counsel, through whom the State continued to contact her. As the State acknowledges, she subsequently provided her husband's business address and maintained communications throughout the case. (*Id.* at 16) Because of her inability to obtain discovery and the expense of repeated trips to New Jersey, she decided not to attend much of the testimony, consequently accelerating the hearing.

a post-suspension proceeding more protracted than any ever sanctioned by a Federal court.

II. THE STATE IMPROPERLY PLACES THE BURDEN OF PROOF AS TO THE REASONS FOR DELAY ON PETITIONER.

As set forth in the Petition, this Court has recognized that once a professional's license has been suspended, that individual's interest in speed becomes paramount. *Barry v. Barchi*, 443 U.S. at 66. Here, the Appellate Division clearly subordinated petitioner's interest in a prompt determination to the State's general interest in professional regulation: "Hence the right of doctors to practice their profession is necessarily subordinate to this governmental interest." (Pa 9a-10a)

In its opposition, the State justifies its subordination of petitioner's interest by arguing that since the Board's initial suspension completely destroyed her reputation, her interest in a prompt proceeding may be disregarded. (Resp. Br. at 18) A more callous and unacceptable resolution to the problem of balancing the interests of the State and the individual could not be imagined. Standing logic on its head, the State argues that the greater the injury inflicted, the less weight should be accorded the individual's right to its speedy review. It also defies common sense to assert that petitioner's harm was not compounded by her protracted exclusion from the practice of medicine which the unduly delayed hearing inflicted.

The State's excuse that complexity justifies the two and one-half year delay borders on the ludicrous. Virtually all the violations found dealt with petitioner's failure to obtain physical examination data or to answer all telephone calls personally. These charges did not involve factual disputes. Petitioner offered to stipulate the facts based on a limited number of patients. These generic standard of care issues applicable to a practising psychiatrist could have been decided on the basis of expert testimony in less than a month.

Realizing the harshness of its position, the State misleadingly argues that petitioner could have resumed practice by accepting certain reasonable restrictions. That is false. As the ALJ

recognized: "Dr. Brayshaw's major area of interest was the interrelationship between thyroid disorder and mental illness." (PaE 115a) Without the ability to prescribe Synthroid, Brayshaw could not continue to treat her patients. While the State claims she was free to practice medicine during the pendency of the suspension hearing (Resp. Br. at 4-5, 15-17), she could only do so by abandoning the use of Synthroid therapy and establishing a new specialty. (Pet. at 10) Contrary to the State's claim that she sought "to vacate the temporary suspension without accepting the protective provisions" (Resp. Br. at 17), Brayshaw made several proposals to the State which suggested strict protocols for the prescribing of Synthroid and otherwise complied with all of the Board's restrictions; the State did not even respond to those proposals.

III. THE STATE FAILS TO PROVIDE ANY ACCEPTABLE JUSTIFICATION FOR ITS DENIAL OF MATERIALS NECESSARY TO THE CROSS-EXAMINATION OF THE STATE'S WITNESSES.

The State responds to petitioner's need for other-physician records relating to the patients at issue by (1) asserting their confidentiality deriving from the patient-physician privilege (Resp. Br. at i, 19); (2) asserting their "non-pertinence to the charges against" petitioner (*id.* at 20); and (3) misleadingly suggesting that she was provided with such information. (*Id.*)

In relying on the confidentiality of patient-physician records, the State tenders to this Court for decision the unresolved question raised in Dr. Brayshaw's petition: may the State withhold information necessary for cross-examination of hostile witnesses on the ground of the patient-physician privilege?

The State moves on to assert without explanation the "non-pertinence" of other-physician records. That position is untenable. Petitioner Brayshaw has explained that many of the symptons, upon which the State relied in charging her with failure to conduct physical examinations personally, were characteristic of her patient cohort, whether or not she prescribed Synthroid. (Pet. at 18) These symptoms would have been revealed in the records kept by other physicians treating Dr. Brayshaw's patients. These

records would have directly contradicted the witnesses' testimony that the symptoms were due to petitioner's prescription of Synthroid. How it can be said, under these circumstances, that the records are "non-pertinent" defies understanding.

The State further argues without substantiation that the ALJ made available numerous records of other physicians treating the patients at issue, although the State does not dispute the existence of a procedure which permitted the ALJ unfettered discretion to deny the production of such records and to review records *in camera* to determine if Brayshaw should be permitted access to them.[3] The State proceeds to suggest, with calculated ambiguity, that petitioner in fact received the necessary other-physician testimony. That is simply false. The exhibit list upon which the State relies indicates the production of other-physician records concerning only three of a total of twenty-seven patients.[4] (*See* RaE 16a-28a, exhibits R-11, R-23 and R-152)

IV. IN AN EFFORT TO DISTRACT THE COURT FROM ITS DENIAL OF DUE PROCESS, THE STATE IMPROPERLY INTRODUCES UNPROVEN, IRRELEVANT ALLEGATIONS OF MISCONDUCT.

Although irrelevant and deplorable, the State's personal attack on petitioner Brayshaw, by publication of unproven charges, compels a brief response. The State contends, for instance, that

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[3] Although the State's argument suggests otherwise, Brayshaw does not allege any due process violation as a result of the ALJ's failure to permit her discovery of the treatment records of persons who were not patients. (Resp. Br. at 19)

[4] The remaining patient records, which appear on the exhibit list, consist of either Brayshaw's records or records of testifying experts.

The State complains repeatedly about Brayshaw's failure to provide the Court with the exhibit list. Because neither party produced the list in the appellate proceedings in the New Jersey state court, counsel was unaware that this document was part of the ALJ's decision. The State further complains of counsel's oversight in failing to produce the corrected Board decision. While the insignificance of the corrections is apparent from the State's failure to produce the corrected version for this Court, accompanying this reply brief is a copy of the corrected decision which Brayshaw is simultaneously lodging with the Clerk of the Court.

Brayshaw attempted to misrepresent the results of laboratory studies and improperly profited from her participation in DNB Laboratories, a corporation established to coordinate and supervise the laboratory testing of Brayshaw's patients. (Resp. Br. at 4, 10, 11, 14 and 15) While petitioner's disclosures with respect to DNB Laboratories were deemed inadequate, the ALJ found that DNB Laboratories' charges corresponded to its expenses and that Brayshaw's modification of laboratory reports reflected the reasonable exercise of her medical judgment. (PaE 130a, 132a) The ALJ concluded:

> "To the extent that Respondent 'changed' any reference range utilized by other laboratories . . . these acts were not deliberately calculated to mislead or deceive any patient. . . . Rather, I accept respondent's assertion that any adjustments were the product of her sincere effort more accurately to gauge the medical status of the patient in light of the results obtained from the testing." (PaE 132a)

In finding #16, the ALJ expressly noted that DNB's charges were such as to "legitimately" take into account its various costs and expenses, concluding that "in no instance was DNB's charge so exorbitant as to raise a serious question with regard to the propriety of its charge". (PaE 130a)

Likewise, the State recklessly alleges that Brayshaw intimidated witnesses (Resp. Br. at 4) but again fails to describe the ultimate findings of the ALJ and the Board, both of which ultimately dismissed this charge as without merit. (Pa 50a; PaE 263a)

Most misleadingly, the State erroneously suggests that Brayshaw caused harm to her patients by the prescription of Synthroid. The Board did *not* sanction Brayshaw for the prescribing of Synthroid and did *not* find that the dosages prescribed placed any of her patients in danger or caused the "panoply of horrors" which the State alleges. (Resp. Br. at 15 n.11) (Pa 17a-18a)

Thus, despite all of the State's accusations of "imminent peril to the public" (Resp. Br. at i) and its reckless detailing of

unproven charges, this case remains one in which the State, in violation of petitioner's due process rights, destroyed a professional's promising career simply because she, consistent with the practice of psychiatrists, did not insist on the delivery of physical examination reports or personally answer all of her patients' telephone calls. (Pa 18a-21a) The State's opposition, in its vindictiveness and carelessness, does little more than expose the mentality which led to petitioner's denial of due process below.

CONCLUSION

For the foregoing reasons and those discussed in the petition, this Court should grant the writ of certiorari.

Respectfully submitted,

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